FOR IMMEDIATE RELEASE **R-2545**
Friday, November 26, 2004 **202/273-1991**
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NLRB OVERRULES M.B. STURGIS

The National Labor Relations Board, in a 3-2 decision, returned to longstanding Board precedent and held that employees obtained from a labor supplier cannot be included in a unit of permanent employees of the employer to which they are assigned unless all parties consent to the bargaining arrangement. *Oakwood Care Center and N&W Agency, Inc.*, 343 NLRB No. 76. The decision is posted on the Board's website at www.nlrb.gov.

The majority of Chairman Robert J. Battista and Members Peter C. Schaumber and Ronald Meisburg found that such units, combining jointly-employed supplied employees and permanent employees solely employed by the user employer, are multiemployer units. Under Section 9(b) of the Act, consent is required for the establishment of such multiemployer units. Members Wilma B. Liebman and Dennis P. Walsh dissented.

The decision, dated November 19, 2004 and made public today, overrules the Board's decision in *M.B. Sturgis*, 331 NLRB 1298 (2000), which held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the Act. *Sturgis* had overruled established precedent finding such units to be impermissible, absent consent. See *Lee Hospital*, 300 NLRB 947 (1990).

The majority in *Oakwood* stated:

> By ignoring the bright line between employer and multiemployer units, *Sturgis* departed from the statutory directive of Section 9(b) as well as decades of Board precedent. We find that the new approach adopted in *Sturgis*, however well-intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy.

The majority pointed out that in the units authorized by *Sturgis*, some of the employees are employed by the user employer while others are employed by the joint employer. "Thus, the entity that the two groups of employees look to as their employer is not the same. No amount of legal legerdemain can alter this fact."

The majority also stated that national labor policy was better served by limiting *Sturgis* – type units to cases where all parties consent. Allowing such units without consent opens the door to significant conflicts among the various employers and groups of employees participating in the collective bargaining process. The multiple employers are placed in the position of negotiating with one another as well as with the union. These are precisely the types of conflicts that Section 9(b) and the Board's community of interest tests are designed to avoid.

In dissent, Members Liebman and Walsh cited the rise of alternative work arrangements in response to global economic pressures on employers. They argued that workers in these arrangements would now effectively be barred from organizing labor unions, unless their employers consented. Rejecting the majority's "supposed strict construction" of the statute, the dissent pointed to the Board's "disturbing reluctance to recognize changes in the economy and the workplace and to ensure that our law reflects economic realities and continues to further the goals that Congress has set."

The dissenters described *Lee Hospital* as "a 10-year-old decision, missing any rationale, which itself broke with precedent." The dissenters argued that neither the language of the statute, nor its legislative history foreclosed a *Sturgis* unit. Rather, the Board has broad discretion to determine an appropriate bargaining unit. The dissent repeatedly cited the Board's statutory duty "to assure to employees the fullest freedom in exercising their rights." *Sturgis* units facilitate collective bargaining, the dissenters observed, and pointed to the lack of empirical support for the majority's contrary view. They characterized the majority's decision as "at worst accelerating the expansion of a permanent underclass of workers" and predicted that it would "hasten the obsolescence of this statute."

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